

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED GOTTSCHALK,

Defendant-Appellant,

and

ATTORNEY GENERAL,

Amicus Curiae.

UNPUBLISHED

June 18, 2002

No. 237681

Iosco Circuit Court

LC No. 01-004203-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY SILAGY,

Defendant-Appellant,

and

ATTORNEY GENERAL,

Amicus Curiae.

No. 237682

Iosco Circuit Court

LC No. 01-004204-FH

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendants appeal by leave granted a circuit court order denying their motions to quash the information and dismiss the prosecution. We reverse.

Defendant Silagy, a Department of Natural Resources employee, signed a complaint against Steven Freund, stating that Steven Freund filled or caused a wetland to be filled without the appropriate permit. In response, Steven Freund filed a complaint alleging that Silagy committed perjury. After investigating the case, the Iosco County prosecutor decided not to advance the perjury charge, but concluded that a charge pursuant to MCL 752.11—a misdemeanor offense based on a public official’s failure to uphold or enforce the law—might be appropriate. However, the prosecutor further determined that he, and his office, had a conflict of interest because there was a possibility he could be called as a witness. At the prosecutor’s request the circuit court appointed a special prosecutor to review the incident report and determine whether a warrant should be issued.

The special prosecutor investigated and initiated charges of conspiracy and obstruction of justice against Silagy and his supervisor, defendant Gottschalk. The evidence adduced at the preliminary examination indicated that the property at issue was owned by Steven Freund’s father, William Freund. There was also evidence showing that at the time Silagy signed the affidavit supporting the complaint against Steven, he knew that William was the individual responsible for the fill. The special prosecutor further maintained that Silagy was aware that the area in question did not qualify as a jurisdictional wetland. The special prosecutor then alleged that Gottschalk knew Steven Freund did not fill a jurisdictional wetland, but conspired with Silagy to falsely indict him. After the preliminary examination, the district court bound defendants over on charges of conspiracy, MCL 750.157a, and obstruction of justice, MCL 750.505.

Defendants argue that the charges should be dismissed because the special prosecutor exceeded her authority. We agree. Statutory interpretation is a question of law that this Court reviews de novo on appeal. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

The circuit court specifically appointed the special prosecutor pursuant to MCL 776.18. According to MCL 776.18, the prosecutor, under the direction of the court, is permitted to appoint an assistant to help the prosecutor or to perform the prosecutor’s duties if the prosecutor is disabled. However, there is no indication in the record that the Iosco County prosecutor was disabled or that the special prosecutor was intended to assist him. Rather, the prosecutor petitioned the court to appoint a special prosecutor because he, and his entire office, faced a potential conflict of interest with the case. We note that under MCL 49.160, the court is allowed to appoint a special prosecutor when the prosecutor is disqualified by a conflict of interest or is otherwise unable to attend to the duties of office. Therefore, we conclude that the circuit court intended to appoint the special prosecutor pursuant to MCL 49.160 and that the appointment was limited by the constraints applicable to that statute.

The judiciary’s authority to appoint a special prosecutor is limited and governed exclusively by statute. *People v Herrick*, 216 Mich App 594, 598; 550 NW2d 541 (1996). Special prosecutors appointed pursuant to MCL 49.160 are not permitted to investigate matters or issue warrants. *Herrick, supra* at 601, n 3; *In re Appointment of Special Prosecutor*, 122 Mich App 632, 635-636; 332 NW2d 550 (1983). Rather, according to MCL 49.160, courts are only allowed to appoint a special prosecutor to perform the duties of the prosecuting attorney that are already before the court. See *Special Prosecutor, supra* at 635-636.

Decisions regarding the initiation of criminal charges are discretionary executive acts. In deference to principles of separation of powers, judicial interference with the exercise of this discretion is severely limited. If the amended statute were interpreted as allowing the appointment of a special prosecutor to initiate criminal charges, even for legitimate reasons such as conflict of interest, the court's appointment of a special prosecutor would constitute a judicial second-guessing of the prosecutor's actions. [*Id.* at 636 (citations omitted).]

Because the special prosecutor in this case conducted significant investigation and issued a warrant on charges other than those authorized by the prosecutor, we find that she exceeded the scope of her appointment.

Reversed and remanded with instructions to dismiss the charges against defendants. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper